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No. 96-1622

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

NICHOLAS KNAPP,
Petitioner,
v.
NORTHWESTERN UNIVERSITY,
an Illinois not-for-profit corporation,
and RICK TAYLOR,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly held that it was appropriate under the Rehabilitation Act of 1973 to defer to the decision of Northwestern University's team physician, supported by the consensus recommendation of a group of nationally respected cardiologists, that a student with petitioner's medical condition should not participate in intercollegiate basketball.

2. Whether petitioner is "substantially limited" in a "major life activity" by not being permitted to play intercollegiate basketball at Northwestern because of his heart condition, even though his scholarship continues and he continues to receive access to the academic and non-academic services offered by the University.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT	1
REASONS FOR DENYING THE PETITION	6
CONCLUSION	14

TABLE OF AUTHORITIES

CASES — Page

Doe v. *New York Univ.*, 666 F.2d 761 (2d Cir. 1981) 10
Homeyer v. *Stanley Tulchin Assocs., Inc.*, 91 F.3d 959 (7th Cir. 1996) 13
Mantolete v. *Bolger*, 767 F.2d 1416 (9th Cir. 1985) 8, 9
Mendez v. *Gearan*, 1997 U.S. Dist. LEXIS 1594 (N.D. Cal. Feb. 13, 1997) 10
School Bd. of Nassau County v. *Arline*, 480 U.S. 273 (1987) 5, 7, 8, 10
Wood v. *Omaha Sch. Dist.*, 25 F.3d 667 (8th Cir. 1994) 9

STATUTES AND RULES

29 U.S.C. § 706(8)(B) 5
Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. § 791 9
Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ..... *passim*
34 C.F.R. § 104.3(j)(1)(ii) 12

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT

1. Petitioner Nicholas Knapp is a student who attended Peoria Woodruff High School in Illinois and now attends Northwestern University. Northwestern is a private educational institution with its main campus in Evanston, Illinois. Northwestern is a member of the National Collegiate Athletic Association, the Big Ten Athletic Conference and competes at the Division I level in intercollegiate sports, including men's basketball.

Based on his performance in high school, petitioner is precisely the type of scholar athlete that Northwestern recruits to play on its basketball team. He is academically gifted and was one of the best high school players in

Illinois as a junior. In the summer before petitioner's senior year of high school, Northwestern orally offered him a full athletic scholarship, which he orally accepted.[1] Tragically, during the first few weeks of his senior year, petitioner "suffered sudden cardiac death—meaning his heart stopped—during a pick-up basketball game." Pet. App. A-2.

Fortunately, paramedics were able to revive petitioner through cardiopulmonary resuscitation, defibrillation and drug injections. Petitioner was hospitalized and later physicians implanted a cardioverter-defibrillator in petitioner's abdomen. This is a device that will attempt to restart petitioner's heart if it goes into ventricular fibrillation. *Id.*

True to its word, Northwestern reaffirmed its commitment to provide petitioner with a full scholarship, regardless of his ultimate medical condition. Accordingly, in the fall of his senior year, petitioner signed a national letter of intent to attend Northwestern. Because of his heart condition, petitioner did not play basketball during his final year in high school. He did graduate valedictorian of his high school class in the spring of 1995 and he enrolled that fall at Northwestern. *Id.* at A-2 to A-3.

2. The determination of an athlete's medical eligibility to participate in an intercollegiate athletic program is not made by athletic directors or coaches. The risk is too great that they may downplay the importance of medical problems in favor of having a talented player available to participate. For that reason, Northwestern's Presidential

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[1] Under the rules of the National Collegiate Athletic Association, a member institution is not permitted formally to accept a signed national letter of intent from a student to attend a particular university until the fall of the student's senior year in high school. It is, however, permissible and common for major universities to obtain oral commitments from student athletes prior to the formal signing date.

Directive on Self-Regulation of Intercollegiate Athletics, the Big Ten Conference's Handbook Agreements for Men's Programs, and the NCAA's Constitution and Sports Medicine Handbook all place the sole responsibility to decide whether a student athlete is medically eligible to compete in the judgment of the team physician. Pet. App. A-3 n.1.

Northwestern's head team physician declared petitioner ineligible to compete on Northwestern's basketball team for the 1995-1996 season. This judgment was based:

> on [petitioner's] medical records in which several treating physicians recommended that [petitioner] not play competitive basketball, the report of team physician Dr. Mark Gardner following a physical examination of [petitioner], published guidelines and recommendations following two national medical conferences known as the Bethesda Conferences regarding eligibility of athletes with cardiovascular abnormalities, and recommendations of physicians with whom Dr. Gardner and Dr. Sweeney consulted.

Id. at A-3 to A-4 (footnote omitted).

Under ordinary circumstances, a defibrillator should effectively protect the health of an individual with petitioner's condition. The problem is that, if petitioner plays intercollegiate basketball, he unquestionably faces an increased risk of his heart stopping (*i.e.*, death) because of his medical problems. *Id.* at A-5. In addition, no one can confidently predict how the defibrillator will perform in the unusually stressful conditions created by participating in intercollegiate basketball. Thus, there exists a significant, but unquantifiable, risk that, if petitioner's heart were to stop while he was playing, the defibrillator might not restart the heart. R. 107-3 at p. 149.

Although ineligible to compete on the team, petitioner retained his scholarship and was invited to attend all basketball practices and to sit on the bench with the team at all games. Moreover, he had access to all other aca-

demic and nonacademic programs specially designed for athletes and has remained eligible for other academic and nonacademic offerings the University provides to its students. Pet. App. at A-4.

3. Petitioner filed this lawsuit in the United States District Court for the Northern District of Illinois, alleging that the University's decision to exclude him from intercollegiate basketball at Northwestern violated § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. He sought injunctive relief and compensatory damages.

The district court, after a hearing on petitioner's eligibility to play basketball for Northwestern, granted petitioner injunctive relief. The court first determined that petitioner's heart condition is a "physical impairment" within the meaning of the Act and then considered whether it "substantially limits one or more of his major life activities," which is necessary to be considered disabled within the meaning of § 504.

Finding the issue "not free from doubt" (Pet. App. C-4), the court concluded that playing intercollegiate basketball is a "major life activity" to petitioner. *Id.* Moreover, according to the district court, forbidding petitioner from competing at the intercollegiate level does substantially limit petitioner's ability to participate in his education. *Id.* at C-4 to C-5.

With respect to whether petitioner is "otherwise qualified" to play intercollegiate basketball, the district court gave no consideration to the process by which Northwestern reached its conclusion. Instead, the court concluded that the question is "whether the risk of injury, death, to [petitioner] of playing intercollegiate basketball is substantial." *Id.* at C-7. Moreover, the court reasoned that it was free to decide this question *de novo*. Indeed, for petitioner to prevail, the district court was required to decide the issue that way because the court expressly found that "Northwestern . . . ma[d]e a rational deci-

sion based on reasonable evidence that [petitioner's] risk is substantial. . . ." *Id.* at D-6. Thus, weighing the expert testimony for itself, the district court concluded that petitioner's risk of death "is not substantial" and therefore the University's decision violated § 504. *Id.* at C-8.

4. The court of appeals unanimously reversed. Pet. App. A-1 to A-22. The court first recognized that this case "does not fit neatly under the Rehabilitation Act." *Id.* at A-8. Nevertheless, turning first to the question of petitioner's "disability," the court noted that the parties framed the issue in terms of whether intercollegiate sports is a "major life activity" within the meaning of the Rehabilitation Act. 29 U.S.C. § 706(8)(B). The court of appeals observed that petitioner "is an intelligent student and athlete, and the inability to play intercollegiate basketball at Northwestern forecloses only a small portion of his collegiate opportunities." Pet. App. A-13 to A-14 (footnote omitted). Holding that "[t]he Rehabilitation Act does not guarantee an individual the exact educational experience that he may desire, just a fair one," the court of appeals concluded that petitioner was not "disabled" as a matter of law. *Id.* at A-14.

Alternatively, the court of appeals held that petitioner is not "otherwise qualified" to play intercollegiate basketball at Northwestern. Applying this Court's analysis in *School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987), the court of appeals held that "medical determinations of this sort are best left to team doctors and universities as long as they are made with reason and rationality and with full regard to possible and reasonable accommodations." Pet. App. A-19. Because the University's decision was the product of "reasoned and medically sound judgments," the court of appeals concluded that petitioner was not qualified to play basketball at Northwestern. *Id.* at A-22 (quoting *Arline*, 480 U.S. at 284-85).

REASONS FOR DENYING THE PETITION

This is a novel and hopefully unique case. As the district court candidly acknowledged, "nor has there ever been an individual who has suffered ventricular fibrillation and sudden death, had an automatic defibrillator implanted and continued to play competitive basketball at a Division I level." Pet. App. D-1 to D-2. Given this extraordinarily rare situation, which the court of appeals rightly concluded does not fit neatly into the Rehabilitation Act framework in any event, this case is an inherently unsuitable vehicle for attempting to provide general guidance concerning the meaning of § 504 of the Rehabilitation Act of 1973.

Given the nonrecurring nature of the precise issue actually presented in this case, petitioner, not surprisingly, proposes as the primary question presented whether the court of appeals improperly deferred to the University's decision not to permit petitioner to compete on the varsity basketball team. But even this putatively broader question cannot be divorced from the peculiar circumstances of this case. The team physician's role in this case is relatively unique and the decision to defer to his judgment, supported as it is by both expert testimony and the consensus recommendations of a national medical conference that has reviewed the issue twice in recent years, hardly poses a typical question concerning the proper role of the judiciary in cases arising under the Rehabilitation Act.

Finally, petitioner challenges the alternative holding below that his disability does not impair a major life activity because intercollegiate basketball, by itself, is not such an activity. Even petitioner does not assert that the decision below conflicts with any decision of either this Court or any other court of appeals. Because this alternative ground for decision plainly does not warrant review by this Court, the petition should be denied.

1. The unique circumstances giving rise to this case undermine any realistic likelihood that the precise problem posed here will recur "frequently." Indeed, it is likely that such a case will never arise again. Accordingly, petitioner is forced to present his question as involving a broader issue concerning the proper role of the courts in reviewing whether an individual is "otherwise qualified" within the meaning of § 504 of the Rehabilitation Act. The court of appeals' decision that petitioner was not qualified to play intercollegiate basketball was both correct and not in conflict with any prior decision of this Court or any court of appeals.

A. This Court in *Arline* identified the "basic purpose of § 504" as "to ensure that handicapped individuals are not denied . . . benefits because of the prejudiced attitudes or the ignorance of others." 480 U.S. at 284. Guided by that purpose, the Court did not authorize a freewheeling judicial inquiry into "otherwise qualified" that was divorced from the actual decisionmaking process of the recipient of federal funds. Instead, adopting the inquiry proposed by the American Medical Association as *amicus,* the Court directed lower courts to analyze the issue based on "reasonable medical judgments." *Id.* at 288. In this regard the Court instructed lower courts to consider (1) "the nature of the risk," (2) "the duration of the risk," (3) "the severity of the risk," and (4) "the probabilities" that various risks will occur. *Id.* The focus of the inquiry at the initial phase of determining whether a candidate is "otherwise qualified" is on the employer's decision and what medical information was available to support that decision and whether the decision reflects reasoned decisionmaking.[2]

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[2] That the focus in *Arline* was on the reasonableness of the employer's decision in light of "reasonable medical judgments" is revealed by the Court's discussion in footnote 18, where it leaves open what deference is owed by a court to an employer's decision

This describes precisely what Northwestern did in this case. The University did not respond reflexively to petitioner's condition. First, it voluntarily fulfilled its oral commitment to provide petitioner with a full athletic scholarship, regardless of his medical condition. Second, the University arranged for petitioner to be examined by the team physician, who made a recommendation based on the examination, the patient's history, generally available information about petitioner's condition, and recommendations from other consulting physicians. See *supra* p. 3. In deferring to the team physician's judgment Northwestern followed its previously published guidelines that medical eligibility for participation in intercollegiate athletics is left strictly to the judgment of the team physician. See *supra* pp. 2-3. Finally, the consensus and repeated recommendation of a national conference of specialists in this field concluded that athletes with petitioner's condition should not be declared eligible to participate in "moderate and high intensity competitive sports," which includes basketball. Pet. App. A-3 to A-4 n.2. In sum, the University's decision plainly was not the product of prejudice or ignorance and does not run afoul of the standards in *Arline*.

B. Even less persuasive is petitioner's assertion (Pet. 12-14) of a conflict among the circuits. The primary case relied upon by petitioner (Pet. 12-13), *Mantolete* v. *Bolger*, 767 F.2d 1416 (9th Cir. 1985), specifically focused its analysis of "otherwise qualified" on the employer's reliance upon "all relevant information regarding . . . medical history . . . [in] assess[ing] both the probability and severity of potential injury." 767 F.2d at 1423. Indeed, the Seventh Circuit here relied upon *Mantolete* as support for its conclusion. Pet. App. A-16 to A-17.

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made solely in reliance upon the opinion of a private physician. 480 U.S. at 288 n.18. For reasons discussed *infra*, this case does not present the question the Court left open in *Arline*.

Petitioner argues that the court below erred in ignoring the reference in *Mantolete* to *de novo* review. Pet. 12-13 & n.5. It is petitioner, not the court below, that has misread *Mantolete*.

As the Ninth Circuit there explained, in deciding whether § 501 of the Rehabilitation Act, 29 U.S.C. § 791,[3] is violated, there is a two-step inquiry on the issue of whether an individual is qualified. First, the plaintiff must demonstrate that he is "qualified to perform the essential requirements of the job without a reasonable probability of substantial injury to the [plaintiff] . . . ." 767 F.2d at 1423. If plaintiff fails to make that showing, then the second issue is whether reasonable accommodations can be made by the employer to permit the plaintiff to perform adequately and safely. *Id.*

This case involves solely the question of petitioner's basic ability to play intercollegiate basketball without causing harm to himself. The reference to *de novo* review by the court in *Mantolete,* however, arises in its discussion of the reasonable accommodation issue. Moreover, the strict standard of review is derived at least in part from regulations relevant only to federal employers that impose a higher duty on governmental employers to accommodate disabled workers. *Id.* at 1423; see *supra* note 3. Thus, *Mantolete* does not address the issue of *de novo* review of the issue in this case. Accordingly, *Mantolete,* which in any event is a pre-*Arline* decision, in no way conflicts with the holding here to rely upon the University's reasonable judgment concerning petitioner's qualification to play varsity basketball based on clear evidence of a significant medical risk. See *Wood* v. *Omaha Sch. Dist.*, 25 F.3d 667, 669 (8th Cir. 1994)

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[3] As the concurring opinion in *Mantolete* explained, § 501, which applies to federal employees, imposes more significant burdens on the federal government as an employer than § 504 imposes on private employers. 767 F.2d at 1425 (Rafeedie, J., concurring).

(applying *de novo* review to question of reasonable accommodations).

It is far from clear what the Ninth Circuit meant by *de novo* review even if it had intended to apply the term in a context like the one presented here. Another case cited by petitioner (Pet. 13) suggests the correct analysis, which is fully consistent with the Seventh Circuit's approach. In *Doe* v. *New York University*, 666 F.2d 761, 776 (2d Cir. 1981), the court expressly recognized that under the statute it must "make the final determination," but in reaching that determination, the court still should accord "considerable judicial deference" to medical judgments unless there is reason to believe that someone acted improperly. This is precisely how the Seventh Circuit analyzed the issue. It did not abdicate its responsibility to make certain that Northwestern properly relied upon significant and legitimate medical evidence and opinion in deciding what was proper, but the court also did not substitute its judgment for University officials who acted responsibly. In sum, there is no conflict among the courts of appeals on the question presented by petitioner.[4]

C. Petitioner argues that this Court in *Arline* expressed doubt about whether in the employment setting judicial deference is appropriate to the judgment of an employer who relies upon a private physician's advice. Pet. 14-15; *Arline*, 480 U.S. at 288 n.18. In the first place, the footnote makes plain that the focus in *Arline* is on the judgment of the employer or the grant recipient, which should preclude *de novo* judicial scrutiny. See *supra* note 3.

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[4] Petitioner relies heavily (Pet. 10-11) upon a district court decision that criticizes the Seventh Circuit's ruling. *See Mendez* v. *Gearan*, 1997 U.S. Dist. LEXIS 1594, at *20 & n.9 (N.D. Cal. Feb. 13, 1997). The district court does not assert any conflict between the circuits. Indeed, it also reads *Mantolete* for the proposition that what the employer reviewed in making its decision is "important." *Id.* The fact that a single judge otherwise has criticized the approach followed by the court below creates no basis for *certiorari*.

Second, this is hardly the typical case where an employer seeks to justify an adverse employment action by citing some private physician's opinion. The University would like nothing more than to have petitioner play basketball. That was the reason he was offered a scholarship. The reason he is not playing basketball is not because of ignorance or prejudice; it is because the team physician who is invested with sole authority to make the eligibility decision strictly on medical grounds has reasonably concluded that petitioner is not medically fit to play.

Whatever the proper course for a court to follow in the far more typical situation where an employer pretextually seeks to justify adverse action toward an unwanted employee by reference to a physician's opinion, here there is no serious doubt that the University relied upon physicians acting independently, in good faith and in conformity with the consensus recommendation of experts in this precise field and who had studied this precise problem. This case simply does not present the problem the Court was concerned about in *Arline*.

D. Finally, petitioner distorts the opinion below by suggesting that the court itself acknowledged that it will "be the 'rare case' . . . where a disabled" athlete "will be able to attack an exclusion decision." Pet. 16 (quoting Pet. App. A-20 to A-21). That is not what the court of appeals said. What the court said is that when a federal fund recipient makes an exclusion decision that is "individualized, reasonably made, and based upon competent medical evidence," Pet. App. A-20, then it will be a rare case where the court will be permitted to substitute its judgment and find the Rehabilitation Act violated. That statement is not only unquestionably accurate, but also reveals that the court of appeals has not adopted a rule that slavishly defers to exclusion decisions. Instead, the court of appeals quite properly accords those decisions significant respect in circumstances posed here

where the University has made a reasonable choice given the state of knowledge about the risks of petitioner's medical condition. That is all that the Rehabilitation Act as interpreted by this Court in *Arline* requires.

2. The court of appeals alternatively held that petitioner's inability to play intercollegiate basketball does not substantially limit a major life activity—education. Accordingly, the court held that petitioner is not "disabled" within the meaning of the Act. Pet. App. A-14.

Petitioner derides (Pet. 18) the court of appeals' analysis by describing as "absurd[]" the conclusion that he is not entitled to the protections of the Act. But, that is not what the court of appeals held. The court of appeals, based on how the "parties here have framed their arguments," (Pet. App. A-8) focused on whether playing an intercollegiate sport is integral to the major life activity of obtaining an education. Thus, if petitioner had been excluded from some non-sports activity based on his heart condition, the court of appeals would not have held that he is not protected by the Rehabilitation Act. It is disingenuous of petitioner to suggest otherwise.[5]

Finally, petitioner argues (Pet. 22-27) that the court of appeals erred in not affirming the district court on the facts of this case. That, of course, is an inherently fact-bound issue that plainly does not warrant review by this Court. Moreover, the court of appeals' analysis is unassailable. The court was unquestionably correct that "the inability to play intercollegiate basketball at Northwest-

[5] Petitioner also complains (Pet. 21-22) that the court of appeals failed to consider other elements in the regulations defining a disability, such as whether the individual has a "record of impairment" or is perceived as impaired. 34 C.F.R. § 104.3(j)(1)(ii). But the court of appeals did not discuss these issues because the parties framed the issue in terms of the importance of intercollegiate sports to the major life activity of obtaining an education. Having asked the court to answer one question that fully resolves the issue, petitioner can hardly fault the court for declining to answer other questions that would not.

ern forecloses only a small portion of [petitioner's] collegiate opportunities." Pet. App. A-13 to A-14 (footnote omitted). It certainly cannot be argued persuasively that intercollegiate basketball generally is essential to a college education. And petitioner does not make that claim.

Instead, petitioner argues (Pet. 25-26) that he is entitled to an individualized determination of the importance of intercollegiate athletics to him and his education. Petitioner acknowledges that the law in the Seventh Circuit is that ordinarily the individual's "expectations" are important in deciding the question of "disability." *Id.* at 26 (citing *Homeyer* v. *Stanley Tulchin Assocs., Inc.*, 91 F.3d 959, 962 (7th Cir. 1996)). Thus, the issue reduces to whether an unreasonable, subjective expectation is alone sufficient to support a finding that an exclusion substantially interferes with a major life activity. Petitioner cites no case to support such a sweeping proposition and that question, which involves merely an alternative holding of the court below, clearly does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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